

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
SAN ANGELO DIVISION

IN RE:	§	
	§	
TRINITY GAS CORPORATION,	§	CASE NO. 97-60425-11
	§	
	§	
DEBTOR.	§	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**Findings of Fact**

1. Sheinfeld, Maley & Kay, P.C. (SM&K) filed its motion seeking the court's order directing Trinity Gas Corporation (Trinity or the Debtor)<sup>1</sup> to pay SM&K the remaining balance of \$33,000.00 – consisting of an administrative claim of \$18,000.00 and an unsecured claim of \$15,000.00 – owing under the August 7, 1998, Agreed Order Resolving Administrative and Unsecured Claims of Sheinfeld, Maley & Kay (the Agreed Order). SM&K contends Trinity has sufficient funds with which to make the payment, that Trinity has unreasonably refused to pay, and that SM&K should recover sanctions for having had to bring the motion.

2. Trinity objects to paying the \$33,000.00, alleging that SM&K has failed to abide by the terms of the August 7, 1998, Agreed Order, which constitutes their settlement of a dispute over a fee application filed by SM&K. In addition, Trinity requests that the agreement represented by the August 7, 1998, Agreed Order be set aside and that SM&K be required to disgorge the \$12,000.00 in fees already paid. In support of its position, Trinity contends that SM&K violated the terms and spirit of the August 7, 1998, Agreed Order, which required

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<sup>1</sup>“Trinity” or “the Debtor” shall refer to Trinity Gas Corporation, regardless of its status as the pre-petition entity, the debtor, the debtor-in-possession, or the reorganized debtor.

SM&K's support of Trinity's plan<sup>2</sup>, by admitting Cass Weiland as a partner in January, 1999, and allowing him to continue to represent Patricia Sers, whose interests were clearly adverse to those of Trinity.

3. Trinity filed bankruptcy under Chapter 11 of the Bankruptcy Code on December 23, 1997. On January 9, 1998, Henry C. Seals (Seals) was appointed as the Chapter 11 Trustee in the case. The bankruptcy filing was apparently in response to an enforcement action filed by the Securities and Exchange Commission (the SEC Enforcement Action) and a shareholders' derivative action, both of which alleged securities laws violations by Trinity and its former president, Sidney C. Sers (Sid Sers). On February 5, 1998, the court appointed an Official Committee of Equity Shareholders (Equity Shareholders' Committee) which was represented by Andrews & Kurth, L.L.P. (A&K).

4. Prior to the bankruptcy Trinity had employed Robert Yeager of Dallas and SM&K, specifically Lee Polson of its Austin, Texas, office, as its securities attorneys. SM&K also represented Trinity on its initial Chapter 11 filing. After his appointment as Trustee, Seals requested SM&K to assist in the preparation of the schedules and statement of financial affairs. By order dated January 13, 1998, the bankruptcy court approved SM&K's employment as attorneys for the Debtor, noting the limited nature of the employment given Trinity was no longer a debtor-in-possession. SM&K Exh. W(2h). The schedules and statement of financial affairs were completed in mid to late February, 1998, and SM&K's involvement in the case as counsel for Trinity ceased.

5. On May 22, 1998, SM&K filed a fee application seeking \$39,444.50 in attorney's fees and \$3,872.14 in expenses for the period December 15, 1997, through February 28, 1998; an

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<sup>2</sup>The Official Committee of Equity Shareholders was the plan proponent.

additional \$40,753.74 for the months of October, 1997, through part of December, 1997, which time period covered pre-petition fees. The pre-petition fees arose from SM&K's representation of Trinity in connection with the SEC Enforcement Action. SM&K requested that a \$25,000.00 retainer be credited against the \$40,753.74 and that it be allowed an unsecured claim in the bankruptcy for the difference of \$15,753.74. Trinity's Exh. 5.

6. The Equity Shareholders' Committee objected to SM&K's fee application contending that SM&K's representation of Trinity pre-petition in connection with the securities laws issues may have damaged Trinity, thus allowing it a potential right of offset against the fees. While the bankruptcy court approved the fees, to finally resolve the matter and to avoid an appeal, Trinity and SM&K entered into an agreement compromising their dispute over the fees. Upon a joint motion filed by SM&K and Trinity on August 6, 1998, the bankruptcy court entered the Agreed Order on August 7, 1998, which provides, in pertinent part, as follows:

#### AGREEMENTS

7. Payment of SM&K's allowed administrative claim of \$30,000.00 as stated in the Compensation Order will be paid in six monthly installments, beginning August 1, 1998, in the amount of \$4,000.00, and continuing in \$4,000.00 installments on the first of each month thereafter until January 1, 1999, which installment shall be \$10,000.00. Such installments shall be paid by the Trustee in the chapter 11 case subject to the estate's cash availability until such time as this case is either converted or the Committee plan of reorganization is confirmed on or about September 2, 1998, or as soon thereafter as either occurs. After the effective date of any plan of reorganization filed by the Committee is confirmed, the Reorganized Debtor shall take over responsibility for and continue the monthly payments pursuant to this provision.

8. The Committee agrees to and will not file any appeal of the Compensation Order. SM&K will be permitted to immediately apply against its prepetition billing, as reflected in the Application, the \$25,000.00 retainer paid to it prepetition by the Debtor. SM&K will be and hereby is allowed an unsecured claim in this bankruptcy estate for \$15,000.00 for its prepetition services to which unsecured claim the Committee shall not object in any form.

9. Any perceived or alleged claims of Trinity Gas Corporation (including the Reorganized Debtor, upon confirmation of the Committee plan of reorganization), in consideration of the foregoing, are hereby released. Such perceived claims shall include any and all claims, actions or causes of action up through the date of entry of this order that could have been brought for any alleged negligence, misfeasance, malfeasance, or any other type of action, liability for any of which is denied by SM&K, during the time period SM&K represented the Debtor pre-petition and/or after the Debtor became a debtor-in-possession.

10. In exchange therefor SM&K agrees it will vote its allowed unsecured claim and/or its administrative claim in favor of the Committee plan of reorganization, file no objection thereto and not support any opposition to the Committee's plan.

11. Both the Committee and SM&K agree to cooperate with each other in completing the documentation of this agreement between them, including the preparation and execution of any other documents necessary in connection therewith.

12. The Committee, in consideration of this agreement, shall use all best efforts with the Trustee if and as may be necessary to coordinate payment of the installments due SM&K for its administrative fee as set out in Paragraph 7 above.

Consistent with the foregoing, it is hereby

ORDERED that Paragraphs 7-12 hereof shall be effective upon entry of this order, and the same are and shall constitute the orders of this Court.

7. Three \$4,000.00 payments were made by the Trustee prior to confirmation of the Chapter 11 plan. No payments have been made since confirmation by Trinity. SM&K made a few inquiries concerning payment and was told that there were no funds available with which to make the payment. The third amended plan of reorganization for Trinity, which was proposed by the Equity Shareholders' Committee, was confirmed by the court October 27, 1998. SM&K Exh. M. The effective date of the plan was November 10, 1998.

8. On or about April 1, 1998, the Trustee filed his complaint for declaratory and other relief, commencing adversary case no. 698-6007, styled *Henry C. Seals, Chapter 11 Trustee of the Estate of Trinity Gas Corporation v. Sidney W. Sers and Patricia Sers* (the "Declaratory Complaint"), requesting that the court declare certain disputed property to be property owned by

the bankruptcy estate. On March 9, 1998, the Trustee filed a complaint to avoid and recover fraudulent transfers (the “Fraudulent Conveyance Action”), commencing adversary case no. 698-6004, against Sidney Sers, Patricia Sers, Timothy Sers, and Amanda Sers, seeking, among other things, recovery of cash payments and other assets allegedly transferred by or through Trinity to the Sers family.

9. Because of the alleged securities laws violations by Sid Sers and others, on December 8, 1997, the SEC filed the SEC Enforcement Action in the U.S. District Court, Northern District of Texas, Fort Worth Division, styled *Securities and Exchange Commission v. Trinity Gas Corporation, Sid W. Sers, et al*, Case No. 4-97-CV-1018Y. The SEC alleged numerous violations of the Securities Act of 1933 and the Securities Exchange Act of 1934 by Sers and Trinity, including fraud in connection with the purchase and sale of securities, fraud in the offer and sale of unregistered securities, and the unauthorized selling of unregistered securities. This action resulted in entry of a preliminary injunction by the District Court and the freezing of more than \$3,000,000 of assets which were held in the registry of the Federal District Court in Fort Worth (the “Frozen Funds”).

10. The confirmed plan contemplated that if the SEC prevailed in the SEC Enforcement Action, the Frozen Funds would be released to Trinity as the reorganized debtor with a portion thereof used to capitalize Trinity’s business reorganization. The plan represented that the Frozen Funds may not be available “for six months to a year or longer after plan confirmation.” SM&K Exh. K at 5.

11. Cass Weiland became a partner with SM&K in January, 1999.

12. On January 13, 1999, a pre-trial conference was held in the Declaratory Complaint Action (Adversary No. 698-6007), *Trinity Gas Corporation v. Sidney Sers and Patricia Sers*.

Plaintiff Trinity (as the reorganized debtor), appeared through its counsel Kirk Kennedy with Andrews & Kurth. Sidney Sers appeared through his counsel, Haynes & Boone; and Patricia Sers, wife of Sid Sers, appeared through SM&K. The issue was then raised whether SM&K's representation of Patricia Sers was appropriate given SM&K's prior representation of Trinity, both prior to and during the bankruptcy proceeding. Trinity's attorney, Kirk Kennedy, stated that he considered SM&K's representation of Patricia Sers to be a conflict, but he did not think Trinity would be prejudiced by the conflict, and he wished to go forward with trial. This conflict arose because Cass Weiland, who was representing Patricia Sers while he was with the firm of Capshaw, Weiland, Goss & Bowers, had recently joined SM&K. The bankruptcy court, Judge John C. Akard presiding, held that Trinity had no opposition to SM&K's representation of Mrs. Sers and, provided Mrs. Sers sign a waiver of any conflict, he would allow Mr. Weiland and thus SM&K to continue the representation of Mrs. Sers. SM&K Exh. L.

13. On February 11, 1999, Kirk Kennedy (with A&K) wrote Cass Weiland concerning Adversary No. 698-6004, the Fraudulent Conveyance Action, requesting that SM&K withdraw from representation of Patricia Sers, Timothy Sers, and Amanda Sers and requested a response by February 15, 1999. Trinity Exh. 51. By letter dated February 19, 1999, from Cass Weiland to Kirk Kennedy, Cass Weiland expressed that he was surprised by Kirk Kennedy's position as Kennedy had waived the conflict in open court at the pre-trial conference held January 13, 1999. Trinity Exh. 53.

14. On March 2, 1999, in a letter from Van Oliver (with Andrews & Kurth) to Cass Weiland concerning Adversary No. 698-6007, the Declaratory Complaint, it was confirmed that Weiland would agree to respond by March 5, 1999, with SM&K's position regarding the

conflict raised in Kirk Kennedy's February 12, 1999, letter.<sup>3</sup> Trinity Exh. 57. By letter dated March 3, 1999, from Van Oliver, with Andrews & Kurth, to Mike Massad, Glover Roberts, and Cass Weiland, all with SM&K, Oliver advised that the payments owing to SM&K under the August 7, 1998, Agreed Order are subject to cash availability; that no cash was presently available; that, regardless, Trinity was not obligated to make the payment because SM&K had violated the order by hiring Cass Weiland and allowing him to continue to represent the Sers family in the SEC Enforcement Action and in the Fraudulent Conveyance Action, Adversary No. 98-6004; that SM&K had thus breached the agreement; and SM&K had until March 5, 1999, to withdraw from its representation of the Sers family. A & K Exh. 58. On March 8, 1999, Trinity filed its motion to disqualify SM&K in Adversary No. 698-6004. By order entered March 26, 1999, the bankruptcy court denied as moot Trinity's motion on the basis the court had, by order dated March 22, 1999, approved the withdrawal of SM&K and the substitution of Pezzulli & Loewinsohn as attorneys for Patricia Sers. SM&K Exh. N.

15. Cass Weiland, and thus SM&K, continued to represent Patricia Sers in the SEC Enforcement Action after he joined SM&K. When Cass Weiland joined SM&K, SM&K had not represented Trinity for approximately ten months and had not represented Trinity in connection with any litigation. Moreover, at the time he joined SM&K, the Securities and Exchange Commission was the only named plaintiff in the SEC Enforcement Action. The SEC Enforcement Action was ultimately settled, and the Frozen Funds were disbursed to Trinity as the reorganized debtor.

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<sup>3</sup>There is no explanation concerning the reference to 6007 as opposed to 6004 and the date of February 12 on the letter as opposed to February 11. At times the parties confuse the action to which they are referring. As noted in Finding 13, Cass Weiland questions Kirk Kennedy's request that SM&K withdraw in 6004 given the waiver at the January 13 pre-trial conference. However, the waiver was made in connection with the Declaratory Complaint, 6007, not the Fraudulent Conveyance Action, 6004.

16. Cass Weiland apparently represented Patricia Sers (and perhaps other members of the Sers family) from the time the approximate \$3,000,000 was originally frozen in December, 1997, through the time he joined SM&K in January, 1999. Accordingly, Cass Weiland was, on behalf of his clients, making claims to the Frozen Funds.

17. SM&K did in fact vote for the plan, did not file an objection to the plan, and represented no other party in opposition to confirmation of the plan.

18. On April 19, 1999, Trinity filed its motion to require turnover of checks in compliance with court orders in the SEC Enforcement Action pending before the District Court in Fort Worth. The motion alleged that Defendant Patricia Sers and her attorney, Cass Weiland, were refusing to turnover \$40,000 in cashier's checks that were originally obtained by Sid Sers in violation of the court's prior injunction. By order dated May 20, 1999, the District Court in Fort Worth directed Cass Weiland to deposit the \$40,000, which consisted of four \$10,000 checks, and that Patricia Sers and Cass Weiland provide a full accounting of any other funds by June 11, 1999. Trinity Exh. 83.

19. If appropriate, these findings of fact shall be considered conclusions of law.

### **Conclusions of Law**

20. This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding. 28 U.S.C. § 157(b).

21. Trinity's position on this matter does not constitute a direct or collateral attack of the Fraudulent Conveyance Action ( Adversary No. 6004), the Declaratory Complaint (Adversary No. 6007), or the SEC Enforcement Action. Trinity raises SM&K's conflict and lack of disinterestedness with respect to these proceedings in response to SM&K's demand to be paid the balance of the fees owing under the August 7, 1998, Agreed Order. Accordingly, whether



Trinity is obligated to pay the \$33,000.00 to SM&K depends on the terms of the order and whether funds are available with which to make the payment.

22. The August 7, 1998, Agreed Order provides that SM&K was bound to “vote its allowed unsecured claim and/or its administrative claim in favor of the . . . plan of reorganization, file no objection thereto and not support any opposition to the Committee’s plan.” SM&K abided by these terms. It did in fact vote for the plan which contemplated continued litigation of the Fraudulent Conveyance Action, the Declaratory Complaint, and the SEC Enforcement Action.

23. The August 7, 1998, Agreed Order is tantamount to a judgment of this court. *In re Stratford of Texas, Inc.*, 635 F.2d 365 (5<sup>th</sup> Cir. 1981). As it embodies an agreement between Trinity and SM&K, it has the attributes of a contract. *Id.*; *Matter of Texas General Petroleum Corp.*, 52 F.3d 1330 (5<sup>th</sup> Cir. 1995). The language of the Agreed Order is unambiguous. It required that SM&K support confirmation of the plan, which it did.

24. A compromise effected with approval of the bankruptcy court is conclusive and binding on the parties. COLLIER ON BANKRUPTCY, ¶ 9019.02 (15<sup>th</sup> Ed. 2000); *Youngblood Group v. Lufkin Federal Sav. & Loan Ass’n*, 932 F.Supp. 859 (Bankr. E.D. Tex. 1996) (sophisticated debtor that voluntarily agreed in joint Chapter 11 plan negotiated with commercial lender, and submitted to bankruptcy court for confirmation, that debtor would deed certain real property to lender and permit lender to market the same thereby waived its right to later challenge this arrangement between itself and lender).

25. This court has the inherent authority to enforce the settlement agreement of the parties as set forth in the Agreed Order. *In the Matter of Omni Video, Inc.*, 60 F.3d 230 (5<sup>th</sup> Cir. 1995).

26. Trinity has sufficient funds with which to pay SM&K.

27. Trinity shall be directed to pay the unsecured claim of SM&K in the amount of \$15,000.00 and the administrative claim in the amount of \$18,000.00 within twenty days.

28. All other relief requested by the parties is denied.

29. The court will enter its order in accordance with these findings of fact and conclusions of law.

30. If appropriate, these conclusions of law shall be findings of fact.

Signed November 9, 2000.

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Robert L. Jones  
UNITED STATES BANKRUPTCY JUDGE